IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALEXIE MORRIS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13086 Trial Court No. 2NO-16-00535 CR MEMORANDUM OPINION No. 6945 — May 26, 2021

Appeal from the Superior Court, Second Judicial District, Nome, Romano D. DiBenedetto, Judge.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth D. Friedman, Redding, California, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge ALLARD.

Alexie Morris was convicted, following a jury trial, of two counts of third-degree recidivist assault and one count of witness tampering[1] after he struck his girlfriend

[1] AS 11.41.220(a)(5) and AS 11.56.540(a)(1), respectively.

multiple times, dragged another woman out of a car and beat her, and then, while he was in jail pending trial, called his girlfriend and asked her to provide false testimony about the incident. Morris appeals his convictions, raising four claims of error.

First, Morris argues that the trial court erred when it denied his motion for a new jury venire after the trial court mistakenly referred to Morris's past assault convictions when reading the indictment during jury voir dire. We reject this claim of error for the reasons explained here.

Second, Morris argues that the error raised in his first claim was made more prejudicial when the trial court mistakenly used the phrase "third-degree assault" in the jury instructions, even though the jury was properly instructed on the elements of fourth-degree assault (the base-level crime for third-degree recidivist assault). We find no merit to this claim.

Third, Morris argues that his sentence is excessive because the court did not suspend any portion of the sentence or impose a probationary term. We have independently reviewed the sentencing record, and, based on that review, we conclude that the sentence is within the permissible range of reasonable sentences and not clearly mistaken.[2]

Lastly, Morris argues that there are various errors in the presentence report that require correction. For the reasons explained here, we remand this case to the superior court for correction of some of the errors that Morris has identified in the presentence report.

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[2] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

Background facts

On September 13, 2016, Morris and T.A., who were in a relationship, were drinking alcohol with friends at a cabin near Nome. The next morning, Morris and T.A. began arguing and screaming at each other. During the argument, Morris struck T.A. multiple times, causing injuries.

Later in the morning, as the group was preparing to leave the cabin in a car, Morris became angry with C.C., one of the women in the car. Morris dragged C.C. out of the car and began punching and kicking her. During the drive back to town, Morris told C.C. that if she told anyone about the assault, he would kill her. Morris had a rifle in his lap when he uttered this threat.

After the group arrived back in town, Morris and T.A. went to pick up their son from Morris's mother's house. Morris's mother refused to give them the child because Morris and T.A. were still intoxicated. Morris then threatened to hit his mother's husband, which caused his mother to call law enforcement. Morris left before any law enforcement officers arrived. After officers arrived and noticed bruising on T.A.'s face, they opened an investigation into Morris's assaults on T.A. and C.C.

After Morris was arrested and charged with the assaults, he called T.A. from the jail and tried to convince her to falsely testify that he did not assault her. When T.A. testified at the grand jury hearing that Morris hit her, Morris called her again to complain that she did not follow his instructions. (At trial, T.A. testified that Morris did not hit her.)

Morris was indicted by the grand jury on three counts of felony assault and one count of witness tampering. Because Morris had prior assault convictions within the preceding ten years, he was charged with two counts of recidivist third-degree assault under AS 11.41.220(a)(5) (recklessly causing physical injury to a person while having been convicted on two or more separate occasions within the preceding ten years of

crimes with elements similar to AS 11.41.230(a)(1) or (2)) for the assaults on T.A. and C.C. He was also separately charged with third-degree assault under AS 11.41-.220(a)(1)(A) (recklessly placing another person in fear of imminent serious physical injury by means of a dangerous instrument) for allegedly threatening C.C. with a gun.

The jury convicted Morris of witness tampering and both recidivist assaults. However, the jury acquitted Morris of the separate third-degree assault charge for allegedly threatening C.C. with a gun.

The reference to Morris's prior convictions during jury voir dire

As just mentioned, Morris was charged with two counts of third-degree assault under a recidivist theory because he had prior assault convictions. The parties agreed that the trial would be bifurcated so that the jury would not hear about Morris's prior assault convictions unless and until it had found him guilty of the current assaults against T.A. and C.C.

However, at some point during voir dire, the trial court mistakenly read the part of the indictment that referred to Morris's prior convictions. The defense attorney requested that the jury venire be dismissed and a new venire be brought in.[3] The trial court denied this request. Morris argues that this was reversible error.

The State argues that Morris has waived this claim by failing to designate the relevant portions of the record for transcription.

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[3] The defense attorney actually asked for a "mistrial," which was technically not correct because a jury panel had not been sworn in and double jeopardy had not yet attached. But it was clear that the defense attorney was requesting that a different jury venire be brought in. *See Hewitt v. State*, 188 P.3d 697, 699-700 (Alaska App. 2008) (noting that a request for replacement of venire and a request for a mistrial are "closely related" and governed by the same abuse of discretion standard of review).

"[A] party's failure to designate portions of the record that are necessary to allow the determination of a point on appeal will amount to a waiver or abandonment of that point."[4] Here, Morris failed to designate the voir dire for transcription, and we therefore do not have a proper record of the trial court's reference to Morris's prior convictions or Morris's request for a new jury venire.

We have nevertheless listened to the relevant sections of the voir dire and the trial. We note that, at the prosecutor's request, the trial court re-read the charges during voir dire and after the jury was selected — this time, without the reference to the prior convictions. The court also gave the following curative instruction:

> Those are the charges in this case. Anything that you have heard me read, or may have heard me read before is not evidence in this case. As I've indicated throughout the course of jury selection, these are a set of allegations in this case. The only evidence in this case comes from the witness stand as well as evidence that I admit at this trial. Anything else that is said is not evidence in this case. You are to return a verdict based solely upon the evidence that you hear in this courtroom. Beyond that your instructions are as follows . . . .

The trial court's curative actions are similar to those taken by the trial court in *Hewitt v. State*.[5] There, while reading the indictment in a felony driving under the influence case to the venire, the trial court started to refer to the defendant's prior convictions for driving under the influence, but the court caught itself and immediately

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[4] *Miscovich v. Tryck*, 875 P.2d 1293, 1304 (Alaska 1994); *see also Nerox Power Sys., Inc. v. M-B Contracting Co., Inc.*, 54 P.3d 791, 798 n.28 (Alaska 2002) (noting the Alaska Supreme Court's policy of "not examin[ing] on appeal documents that are not part of the record on appeal" (citing *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 223 n.26 (Alaska 1978))).

[5] *Hewitt*, 188 P.3d at 699.

told the venire that it had read "the wrong thing."[6] The court also admonished the venire that the charges were not evidence, that the defendant "is presumed to be innocent," and that it is the State's task to prove the charges beyond a reasonable doubt.[7] Hewitt argued that these curative measures were inadequate and he requested that the venire be dismissed and a new venire summoned. The court denied this request, and we upheld the ruling on appeal as not an abuse of discretion.[8]

We come to a similar conclusion here, and we therefore reject Morris's claim of error. We nevertheless wish to remind trial courts to preview the instructions they give to jury venires before they give them, particularly in bifurcated trials, and to take steps to prevent such mistakes from occurring in the future.[9]

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 700 (explaining that the abuse of discretion standard is intended to govern situations where reasonable judges applying the correct criteria might reach differing conclusions about how to deal with the problem); *see also Bradley v. State*, 197 P.3d 209, 216 (Alaska App. 2008) (no plain error where the trial court read the offense as "felony driving under the influence" in a bifurcated felony DUI trial because the court quickly corrected itself and gave a subsequent instruction that charges were not evidence of guilt).

[9] This mistake continues to regularly occur. *See, e.g.*, *Hewitt*, 188 P.3d at 699-700 (trial court began referring to the defendant's previous DUI convictions while reading the indictment in a felony DUI bifurcated trial); *Bradley*, 197 P.3d at 216 (trial court told the jury venire that the charge was "felony driving under the influence" in a bifurcated felony DUI trial); *Vaughn v. State*, 2015 WL 852906, at *2-3 (Alaska App. Feb. 25, 2015) (unpublished) (trial court told the petit jury that the charge was "felony driving under the influence" during the first portion of a bifurcated felony DUI trial); *Laschober v. State*, 2014 WL 7005586, at *5 (Alaska App. Dec. 10, 2014) (unpublished) (trial judge inadvertently suggested during voir dire that defendant was charged with felony driving under the influence).

The references to third-degree assault in the jury instructions

Because the trial was bifurcated, the jury first deliberated on whether Morris had committed fourth-degree assault against T.A. and C.C. The record shows that the jury was properly instructed on the elements of fourth-degree assault in the first part of the trial, but the instructions mistakenly referred to the charges as third-degree assault. Morris argues that this was reversible error, particularly when combined with the trial court's mistake in reading the full indictment that included references to his prior assault convictions.

We find no merit to this claim. Morris's claim of prejudice rests on his assertion that the jury would have known that "third-degree assault" in this context meant that Morris had prior convictions for assault and was being charged as a recidivist offender. But there is no reason to suppose that anyone on the jury had such a detailed knowledge of Alaska's assault statutes, nor has Morris provided any evidence to substantiate this claim. We therefore conclude that the mislabeling of the charges in the jury instructions was harmless.[10]

Morris's sentence

Morris was convicted of two counts of third-degree assault and one count of first-degree witness tampering, all of which are class C felonies.[11] The jury found a statutory aggravator — AS 12.55.155(c)(18)(D) (victim was "a person with whom the defendant has a dating relationship or with whom the defendant has engaged in a sexual relationship") — with regard to the assault against T.A., and the judge found two

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[10] *Cf. Cassou v. State*, 2009 WL 564685, at *2-3 (Alaska App. Mar. 4, 2009) (unpublished) (finding no plain error when a jury instruction incorrectly stated the crime as "Felony Driving Under the Influence" rather than "Driving Under the Influence").

[11] *See* AS 11.41.220(e); AS 11.56.540(b).

additional aggravators — AS 12.55.155(c)(31) (defendant's criminal history includes five or more class A misdemeanors) and AS 12.55.155(c)(8) (defendant's prior criminal history includes repeated instances of assaultive behavior).[12] Because of these aggravators, the sentencing judge was authorized to impose a sentence of up to 5 years for each count.[13]

At the time of sentencing, Morris was forty-three years old and his criminal history consisted of twelve assault convictions, excluding the current charges. Most, if not all, of his prior convictions involved alcohol, and many of them involved an assault against a domestic partner or a family member. Many of these offenses also occurred while Morris was on probation, and Morris had a significant history of probation and parole violations.

Morris had previously been ordered to complete substance abuse assessments as a condition of probation or parole, and he had failed to do so on at least one occasion. Morris had, however, completed at least some substance abuse treatment during his prior incarcerations and the pendency of this case.

Based on this criminal history, the author of the presentence report noted that "[a] flat sentence might reasonably be imposed in this case." (A "flat sentence" is a sentence with only a term of imprisonment and no suspended time or term of probation.) The author nevertheless recommended that the court impose "a period of incarceration and suspended time with probation" to give Morris "one final opportunity" at probation.

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[12] We note that the assault convictions used for the (c)(8) aggravator were separate and distinct from the assault convictions that were used to elevate Morris's charge to third-degree recidivist assault. *Cf. Juneby v. State*, 665 P.2d 30, 33-34 (Alaska App. 1983).

[13] *See* AS 12.55.125(e) and AS 12.55.155(c).

The trial court rejected this recommendation and instead imposed a composite sentence of 7 years to serve — 3 years to serve on each of the assault convictions and 1 year to serve on the witness tampering conviction — with no probationary term. The court found that Morris had very low potential for rehabilitation, noting that his criminal history showed "the same crime, over and over again" and that Morris had been given multiple opportunities to "get that under control." The court further concluded that isolation and protection of the community should be the primary goals of the sentence. At the end of its sentencing remarks, the court encouraged Morris, if he was "serious about getting the alcohol under control," to "take advantage of the time [he had] in custody" and participate in treatment services the Department of Corrections might offer him.

On appeal, Morris argues that the trial court failed to take proper account of his potential for rehabilitation, and he asserts that the court erred in failing to suspend some portion of the term of imprisonment so that Morris could engage in inpatient substance abuse treatment as a condition of probation.

But the record shows that the court *did* consider Morris's potential for rehabilitation and specifically found that it was low. This finding is supported by the record, which shows repeated failures at probation and a significant history of assaultive behavior while intoxicated even after Morris completed substance abuse treatment.[14]

When we review an excessive sentence claim, we independently examine the record to determine whether the sentence is clearly mistaken.[15] The "clearly mistaken" standard contemplates that different reasonable judges, confronted with identical facts, will differ on what constitutes an appropriate sentence, and that a

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[14] *Keyser v. State*, 856 P.2d 1170, 1176-78 (Alaska App. 1993).

[15] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

reviewing court will not modify a sentence that falls within a permissible range of reasonable sentences.[16]

We have independently reviewed the sentencing record in this case, and we conclude that the sentence imposed is not clearly mistaken.

The errors in the presentence report

Morris argues that there are various errors in the presentence report that must be corrected. The State agrees that a remand is required to correct certain errors in the presentence report.

The parties agree that the presentence report incorrectly states that Morris's conduct was aggravated under AS 12.55.155(c)(18)(E) (assault against a person ten or more years younger than the defendant). The trial court had agreed to correct this misstatement and to instead include the domestic violence aggravator that was actually found by the jury — AS 12.55.155(c)(18)(D). But this does not appear to have been done. Accordingly, a remand is required to correct this error.

The State also points to additional errors that should be corrected. For example, the first page of the presentence report identifies Counts I and II (the assaults involving C.C.) as domestic violence crimes. This is incorrect; only the assault against T.A. qualifies as a domestic violence crime. The presentence report also incorrectly states that Morris was convicted of Count II (the fear assault against C.C.) instead of Count III (the domestic violence assault against T.A.). We agree that these errors should be corrected on remand.[17]

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[16] *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997).

[17] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972).

Morris identifies three other alleged errors that the State does not concede. The first alleged error is the assertion in the presentence report that C.C. "sought . . . alternate residential arrangements out of fear." In the trial court proceedings, Morris objected to this statement as unsupported by the record, but he failed to press the court for a ruling on his objection. The State contends that, by failing to press the court for a ruling, Morris has failed to preserve this claim.[18] The State is correct that the record does not reflect any ruling on Morris's objection to this statement. But because this case is being remanded for other reasons, we conclude that judicial efficiency is best served by having the trial court address Morris's objection on remand and delete the statement if there are insufficient facts to support it.[19]

The second alleged error is the assertion in the presentence report that Morris "pointed a gun at [C.C.] and threatened to shoot her." Morris objected to the inclusion of this sentence in the presentence report because the jury acquitted him of third-degree fear assault for allegedly threatening C.C. with a gun. The trial court acknowledged the jury's acquittal, but nevertheless found, by a preponderance of the evidence, that Morris had threatened C.C. with a gun. The court therefore overruled Morris's objection to this statement and left the statement in the presentence report.

On appeal, Morris argues that the trial court "erroneously substituted itself as finder of fact." But, as the State correctly points out, when imposing a sentence, a trial court is "not bound by the jury's view of the evidence."[20] Instead, the court has the

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[18] *See Pierce v. State*, 261 P.3d 428, 430-35 (Alaska App. 2011).

[19] *Cf. Davison v. State*, 307 P.3d 1, 3 (Alaska App. 2013) (noting that care must be taken to ensure that presentence reports are as accurate as possible because they follow a defendant through parole and probation proceedings).

[20] *Norris v. State*, 857 P.2d 349, 357 (Alaska App. 1993) (citing *Brakes v. State*, 796 P.2d 1368, 1370-73 (Alaska App. 1990)).

authority to consider information it concludes has been proved by a preponderance of the evidence, even if the jury did not find the information proved beyond a reasonable doubt.[21]

However, the court's findings must be supported by substantial evidence in the record.[22] Here, there was no evidence presented at trial that Morris actually pointed a gun at C.C., only that a gun was sitting in his lap when he threatened to kill C.C. if she told anybody about the assault. So, although it was not error for the court to have found by a preponderance of the evidence that Morris threatened C.C. with a gun, the characterization of the threat in the presentence report that Morris *pointed* the gun at C.C. was not supported by the evidence.

Following the same principle of judicial efficiency as above, we conclude that this error should be corrected on remand. We also conclude that the presentence report should make clear that the jury acquitted Morris of the fear assault count but that the trial court found these facts by a preponderance of the evidence.

Lastly, Morris objected to the inclusion of a paragraph in the presentence report that discussed community condemnation of "weapons offenses" and "domestically violent offenses," which "approaches its zenith when [such crimes] are committed by repeat offenders." Morris asserts that this paragraph should be stricken because the assaults did not involve weapons. But, as just explained, the trial court found that Morris threatened C.C. with a gun. The record also shows that Morris qualifies as a repeat offender of domestic violence crimes. Accordingly, we find no error in the trial court's retention of this paragraph in the presentence report.

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[21] *Id.*

[22] *Brakes*, 796 P.2d at 1372; *see also Nukapigak v. State*, 562 P.2d 697, 701 & n.2 (Alaska 1977), *aff'd on reh'g*, 576 P.2d 982 (Alaska 1978).

Conclusion

This case is REMANDED to the superior court for corrections to the presentence report as outlined in this decision. In all other respects, the superior court's judgment is AFFIRMED. We do not retain jurisdiction of this case.